STATE OF MICHIGAN

COURT OF APPEALS

EDWARD J. LOFTUS and DONALD W. JEPPESEN, Plaintiffs-Appellees, v KIMBERLY A. VANDAHM, Defendant-Appellant.	UNPUBLISHED May 4, 2001 No. 221051 Manistee Circuit Court LC No. 98-008925-CK

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiffs, ordering specific performance of a purchase agreement and thereby requiring defendant to sell real estate to plaintiffs. We reverse.

On April 18, 1998, defendant (seller) and plaintiffs (buyers) entered into a purchase agreement for real estate that provided in relevant part:

> **Terms:** The Terms of Purchase shall be . . .
>
> NEW MORTGAGE The full purchase price upon execution and delivery of Warranty Deed, contingent upon Buyer's ability to obtain a *30 (thirty)* (year) mortgage in the amount of $*92,800.00* bearing interest at *8.0 (max)* % per annum, on or before the date the sale is to be closed. Buyer agrees to apply for a mortgage loan within *seven* days after this Agreement is fully executed, not to impair the Buyers' credit after the date hereof, and to accept such loan if offered. Exceptions: *Buyers to provide proof of loan application with[in] 7 (seven) days.* [Hand-written additions in italics.]

According to defendant, she added the seven-day loan and notice obligations because plaintiffs did not have a preapproval letter from a lender and they did not have a potential lender in mind. Because the parties executed the contract on April 18, 1998, the seven-day loan application and notice period expired on April 25, 1998. It is undisputed that plaintiffs neither applied for a loan nor notified defendant of a loan application by April 25, 1998. Two days later, after discussing the matter with her children, defendant decided not to sell the property.

Defendant spoke with one plaintiff on April 27, 1998, and the other plaintiff the next day to advise them that she was not selling the property.

Plaintiffs then brought this action for specific performance of the purchase agreement. The parties filed cross-motions for summary disposition. Consistent with plaintiffs argument, the court ultimately ruled that the "financing contingency" was for plaintiffs' benefit and could be, and was, waived by plaintiffs. The court held that there was an anticipatory repudiation by defendant and that there was no need for plaintiffs to make the useless gesture of tendering full performance because defendant had repudiated the purchase agreement. The trial court entered a judgment for plaintiffs ordering specific performance of the agreement, and this appeal followed.

Defendant first argues that summary disposition should have been granted in her favor, rather than in plaintiffs' favor, because plaintiffs failed to fully perform their obligations under the purchase agreement ("the contract") and were not able to tender performance. Specifically, defendant asserts that plaintiffs were disqualified from receiving specific performance because they failed to comply with the seven-day loan and notice obligations in the contract. Plaintiffs do not dispute that they failed to comply with the loan application and notice obligations, but assert that they waived those obligations, and the trial court agreed.

We review the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Zurcher v Herveat*, 238 Mich App 267, 275; 605 NW2d 329 (1999). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden, supra* at 120.

The primary goal in interpreting a contract is to determine and enforce the intent of the parties. *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994). We examine the contract itself to determine its meaning and enforce it as written "if it fairly allows but one interpretation." *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).[1]

In the present case, plaintiffs and the trial court refer to the loan application and notice provisions in the contract as "the finance contingency," implying that plaintiffs had the option of securing a mortgage – with a cash purchase being the other option. The trial court then reasoned that the financing "option," and thus apparently the loan and notice provisions, were for plaintiffs' benefit and that these provisions could, therefore, be waived by plaintiffs. We find several problems with this analysis.

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[1] At oral argument the parties debated the import of the dissent in *Giannetti v Cornillie*, 204 Mich App 234; 514 NW2d 221 (1994), which was adopted by the Supreme Court in *Giannetti v Cornillie*, 447 Mich 998; 525 NW2d 459 (1994). We find that *Giannetti* is not applicable. There, the issue was whether a contract was formed. Here, the parties clearly entered into a contract. Consequently, the analysis is different.

First, the loan and notice requirements appear in the "Terms" paragraph of the contract, not the subsequent "Contingencies" paragraph. There were several choices to make in the Terms paragraph, one being "CASH" and another being "NEW MORTGAGE." Plaintiffs selected NEW MORTGAGE, not CASH. The contract expressly states that "Other unmarked terms of purchase do not apply," and thus the plain language of the contract reveals that the parties agreed that the purchase would be financed by a mortgage loan. Moreover, the language of the loan and notice obligations is mandatory, not discretionary.

Second, the seven-day loan application requirement and the seven-day proof of loan application requirement, both of which impose obligations on plaintiffs, were specifically written into the Terms paragraph by defendant for her benefit and protection, not for plaintiffs' benefit. Thus, plaintiffs' claim that they waived "the finance contingency," that being the new mortgage obligation, is untenable. A party to a contract can only waive provisions that exist for the benefit of that party. See *Brotman v Roelofs*, 70 Mich App 719, 726; 246 NW2d 368 (1976). The trial court's finding that the "financing contingency," and thus apparently the seven-day loan and notice obligations, were for the benefit of plaintiffs was contrary to any reasonable reading of the purchase agreement as a whole or of those specific provisions in particular.

Finally, plaintiffs have asserted throughout this litigation the directly contradictory positions that they waived the "option" to finance and would purchase with cash and, on the other hand, that they intended to apply for a mortgage to finance the purchase. To allow plaintiffs to ignore such a material, seller-protecting term of the agreement would be to allow plaintiffs to make subsequent, unilateral and fundamental alterations to their contractual obligations as they see fit without the consent of defendant. This unilateral rewriting of material terms is contrary to the obligation-formalizing protection that, in theory, a contract is intended to provide.

The plain language of the contract required plaintiffs to apply for a mortgage loan within seven days and to provide proof of the loan application within seven days. Plaintiffs did neither. "Nonperformance of an obligation due is a breach of contract even though the liability of the nonperforming party is limited or nonexistent." *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 587; 543 NW2d 42 (1995), quoting *Woody v Tamer*, 158 Mich App 764, 773; 405 NW2d 213 (1987). Further, in failing to comply with the loan application and notice terms, plaintiffs breached the contract, and ruled out specific performance. A party may not obtain specific performance if they have breached a material term of the contract. *Sterling v Fisher*, 356 Mich 634, 640; 97 NW2d 64 (1959); *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982), citing *McWilliams v Urban American Land Development Co*, 37 Mich App 587, 592; 194 NW2d 920 (1972). Therefore, the trial court erred in entering a judgment granting specific performance and the judgment must be reversed.[2]

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[2] To the extent that plaintiffs argue that defendant was a dual agent in the transaction and therefore had a fiduciary responsibility to them that prevented her from voiding the contract, we find their argument unpersuasive. Defendant's role as a dual agent does not excuse plaintiffs' obligation to abide by the terms of the contract to which they agreed.

Defendant also claims that plaintiffs never adequately tendered the purchase price, thus disqualifying them from specific performance. "An offer to close, unaccompanied by the necessary payment, does not constitute the legal tender" required to entitle a party to specific performance. *Derosia*, *supra* at 652, citing *McWilliams*, *supra* and *Nedelman v Meininger*, 24 Mich App 64, 75; 180 NW2d 37 (1970). Plaintiffs in this case never tendered the purchase price, they merely asserted that they were ready, willing, and able to close. Therefore, plaintiffs did not adequately tender full performance. The judgment granting specific performance is reversed for this additional reason.

Finally, plaintiffs suggest that because "time is of the essence" was not stated on the purchase agreement that the seven-day time period should be extended to a "reasonable time." We find this argument without merit. As defendant points out, the issue of whether time was of the essence to the loan and notice provisions never arose because the parties inserted an express date certain in both the loan and notice provisions. Where parties establish a date certain, the court is not authorized to determine a "reasonable time" or to substitute that time into the contract. *Al-Oil, Inc v Pranger*, 365 Mich 46, 53; 112 NW2d 99 (1961), quoting with approval 17 C.J.S. Contracts § 506, pp 1080-1081 ("Where a stipulation for performance at a particular time has been waived, the party in whose favor the waiver operates is thereafter bound only to perform within a reasonable time, except in a case where there has been a specific extension of time, in which case it is held that the new time fixed becomes of the essence, as was the case in the original contract."); see also *MacRitchie v Plumb*, 70 Mich App 242, 246; 245 NW2d 582 (1976) ("The general rule is that time is not to be regarded as of the essence of a contract unless made so by express provision of the parties or by the nature of the contract itself or by circumstances under which it was executed."); *Nedelman*, *supra* at 74, 76.

We agree with defendant that she was entitled to summary disposition because plaintiffs failed to comply with the terms of the contract. "It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10)." *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Reversed and remanded for entry of judgment in favor of defendant.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper